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PP

v.

MADSAE SUMMAN & ANOR

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HIGH COURT SABAH & SARAWAK, TAWAU
RHODZARIAH BUJANG JC
[CRIMINAL TRIAL NO: T (45)-4-2008]
8 JULY 2009

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CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B - Trafficking in 38.33 grams methamphetamine - Whether charge defective due to weight of drugs - Whether common intention established - Whether possession proved - Whether actual sale of drugs established - Whether shortcomings in police investigation pertaining to handphone seized from*

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accused - Whether gaps in evidence pertaining to handling of drugs by police

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The two accused were charged for drug trafficking under s. 39B of the Dangerous Drugs Act 1952 read with s. 34 of the Penal Code. The amount of drugs involved was 38.33 grams of methamphetamine. The facts showed that both accused were arrested following a trap set by a police party. Before the trap, information was received by one Lance Corporal Siew of a drug trafficker by the name of Haji Asta wherein a handphone number was also given. The Lance

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Corporal contacted Haji Asta and negotiated a drug sale. An appointed place was set for the delivery of the drugs with the police party in hiding. The 1st accused alighted from a Toyota Hilux car and entered the back passenger door of the Lance Corporal's car whilst the 2nd accused remained in the former car. When the 1st

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accused showed the drugs which he had taken out of an envelope to the Lance Corporal, the Lance Corporal took out his pistol and identified himself as a policeman. The 1st accused then bolted and dropped the envelope by the roadside before he was given chase and arrested. The 2nd accused was arrested when he alighted from the

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Toyota Hilux car and a handphone was seized from him after a body search. The issues were: (1) whether the charge was defective due to the weight of the drugs which was below 50 grams; (2) whether common intention was established; (3) whether possession was proved; (4) whether there was actual sale of the drugs as the

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drugs and money had not exchanged hands; (5) whether there were shortcomings in the police investigations pertaining to the

handphone seized from the 2nd accused; and (6) whether there was contradictory evidence pertaining to the date the photographs of exhibits taken.

Held (discharging and acquitting both accused):

(1) The law does not prescribe a minimum weight for an offence of trafficking – only the minimum for a presumption to arise. Therefore, so long as the prosecution was able to bring its case within the definition of trafficking, the weight of the drugs was immaterial. (para 16)

(2) The Federal Court in *PP v. Saari Jusoh* held that a sale is complete upon transfer of the property in the goods even though the price had not been paid. That was followed by the Federal Court in *Jeva Subramaniam & Anor v. PP*. On the strength of the two decisions, the element of trafficking was proved and if the person the Lance Corporal spoke to was the 2nd accused before the commission of the offence, then there was no question that common intention was established. (para 21, 22, 23 & 25)

(3) The prosecution did not verify whether the SIM card found in the handphone seized from the 2nd accused belonged to its number although the Inspector concerned testified that he had verified it by using the handphone to make a miss call to his handphone. The prosecution's other weakness was that the case against the 2nd accused was built purely on inference by virtue of the telephone calls allegedly made from the handphone seized from him. A prudent investigating officer would have verified that the SIM card found in the handphone bore its number. Also, he would have ensured that not only that the original outgoing calls from the handphone number were made to the Lance Corporal's handphone but also the incoming calls in order to tally with the evidence of the Lance Corporal that he made calls to that number. The fact that those were not done rendered the prosecution's case against the 2nd accused weak. (paras 26, 27 & 28)

(4) There was clear evidence of the 1st accused running away from the car and dropping the envelope containing the drugs on the roadside but in all fairness, a similar conduct could not be attributed to the 2nd accused. That was because there was

A contradiction in the prosecution's evidence, on the one hand, that the 2nd accused was said to have attempted to flee from the car and on the other hand, that he was said to have been arrested while he was seated in the car. (para 30)

B **(5)** The 1st accused's conduct in fleeing from the scene could not be attributed to panic nor fear for life when the Lance Corporal brandished his pistol. Not only did he flee from the car but he also dropped the envelope on the road. Those two conducts were intricately bound and not to be viewed in isolation. Viewed C together against the evidence of the Lance Corporal that the 1st accused opened the envelope to show him the drugs inside, tantamounts to an admission of guilt on his part. The conducts were proof of his *mens rea* for the offence charged. He was not an innocent carrier due to the fact that he opened the envelope D to show the drugs to the Lance Corporal. (para 32)

(6) The element of possession was proved against the 1st accused as the envelope containing the drugs was in his custody and control. As against the 2nd accused possession was not proved E by direct but circumstantial evidence – the circumstances therein referred to the negotiation for sale of the drugs based on the handphone found on him which established that the man the Lance Corporal negotiated with as Haji Asta was the 2nd accused. The fact that he was in the car with the 1st accused F after negotiating the sale of the drugs with the Lance Corporal and determining the place of transaction gave an irresistible and only inference that he knew that the envelope which the 1st accused took to the Lance Corporal's car and showed to him contained the drug methamphetamine. His knowledge of the G drug was established and the element of possession was proved against him. (paras 33 & 34)

(7) The Federal Court in *Wong Swee Chin v. PP* established a general rule that the failure to cross-examine a witness on a crucial part of the case amounted to an acceptance of his H testimony. However, there were exceptions to that principle, for example, where the story in itself was incredible or where counsel chose not to cross-examine as the matter was a delicate one or they just wanted to save the court's time and where one or more witnesses had given evidence on the same subject I matter. In the present case, both accused failed to bring themselves within any of the said exceptions or some other

exceptions which they thought was good law for the court to consider. There being no evidence adduced to the contrary, the prosecution dispelled any improprieties about the safety of the exhibits in the five hours after the seizure to the time of handing over to the Inspector concerned. (paras 37 & 38)

(8) There was contradictory evidence on the date the exhibits pertaining to the drugs and the Toyota Hilux car were photographed. The Inspector concerned who took the photographs was not asked to explain the gaps in the evidence nor was the Corporal concerned who was in charge of the exhibit store called to give evidence. In view of that unexplained anomaly in the evidence, it was not certain that the drugs dropped by the 1st accused and sent to the chemist for analysis was one and the same. As such, there were gaps in the chain of evidence pertaining to the handling of the drugs which was the subject matter of the charge. Although it was not necessary to call each and every witness to ensure that there was no break in the chain of evidence pertaining to the drugs seized, the evidence pertaining to the identity and security of the drugs should be able to withstand the test of maximum evaluation by the court. That had not been achieved in the present case. (para 40, 41 & 42)

(9) As against the 2nd accused, the shortcomings of the investigation with respect to the handphone seized from him strengthened that a *prima facie* case was not established against him. (para 43)

Case(s) referred to:

Abdul Karim Pak Kub & Anor v. PP [1997] 2 CLJ 383 CA ***(refd)***

Abdullah Zawawi Omar v. PP [1985] 2 CLJ 2; [1985] CLJ (Rep) 19 SC ***(refd)***

Abdullah Zawawi Yusoff v. PP [1993] 4 CLJ 1 SC ***(refd)***

Jeva Subramaniam & Anor v. PP [2009] 3 CLJ 597 CA ***(refd)***

Mohd Osman Pawan v. PP [1989] 2 CLJ 388; [1989] 1 CLJ (Rep) 108 SC ***(refd)***

PP v. Mohd Radzi [2006] 1 CLJ 457 FC ***(refd)***

PP v. Chia Leong Foo [2000] 4 CLJ 649 HC ***(refd)***

PP v. Saari Jusoh [2007] 2 CLJ 197 FC ***(refd)***

Shamsuddin Hassan & Anor v. PP [1991] 3 CLJ 2414; [1991] 1 CLJ (Rep) 428 SC ***(dist)***

Su Ah Ping v. PP [1979] 1 LNS 100 FC ***(refd)***

Wong Swee Chin v. PP [1980] 1 LNS 138 FC ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 2, 37(da), 39B(1)(b), (c)
Evidence Act 1950, ss. 8, 114(g)
Penal Code, s. 34

For the 1st accused - Kusni Ambutuwo; M/s Kusni & Komariah & Co
For the 2nd accused - Abdul Ghani Zelika; M/s Johari, Zelika & Co
For the prosecution - Amir Hamzah Othman DPP

Reported by Usha Thiagarajah

JUDGMENT

Rhodzariah Bujang JC:

[1] The Public Prosecutor has brought, against both accused persons, a charge of drug trafficking under s. 39B of the Dangerous Drugs Act 1952 ("the DDA 1952") read with s. 34 of the Penal Code for it was alleged that both accused had a common intention to commit the said offence. The amount of drugs involved was 38.33 grammes of methamphetamine and the offence was said to have been committed on 27 September 2007 at 3.30pm by the roadside of Kunak's water processing plant, a district in the town of Tawau.

[2] A total of seven witnesses gave evidence for the prosecution and from their testimonies, the following story unfolded.

The Prosecution's Case

[3] Lance Corporal RF 136500 Liew Jong was a detective with the Narcotics Department, Divisional Police Headquarters, Tawau. He had received information from an informer of a drug trafficker by the name of Haji Asta from Lahad Datu. He was given a handphone number of Haji Asta – 016-8153043 and he used that number to contact this H. Asta using his own handphone with the number 012-8109708. He introduced himself as a drug pusher interested to do business with him. After an initial denial by Haji Asta of any involvement in drugs dealings and after more than 15 calls from him, Lance Corporal Liew's persistence paid off and when he called him again on 27 September 2007, Haji Asta agreed to sell him 100 grammes of methamphetamine or it's street name, syabu, for RM16,000 per 'bal' (equivalent to 50 grammes) and asked that

Lance Corporal Liew meet him at a shop called Sri Kunak at 2pm on the same day. Lance Corporal Liew agreed and he told Haji Asta that he would be using a black Proton Wira car with registration number SAA 9395B.

[4] Lance Corporal Liew informed his superior ASP Sheik Azhar bin Sheik Omar who then assembled a team to nab Haji Asta. His team comprised Chief Inspector Mohd. Saifullah, Sergeant Major Mohd. Ariffin Omar, Lance Corporal Elly Boniface Siew, Lance Corporal Nasruddin, Lance Corporal Hadry bin Ramlee and Lance Corporal Mohd. Hizam. ASP Sheik divided his men into three groups, the first group, headed by himself, consisted of Sergeant Major Ariffin and Lance Corporal Elly Boniface Siew, whilst the second group, headed by Chief Inspector Mohd. Saifullah and with him was Lance Corporal Hadry bin Ramlee and Lance Corporal Nasruddin. Lance Corporal Liew was alone.

[5] All three groups in separate vehicles moved together from their office and were at the appointed place, Sri Kunak at the appointed time, 2pm.

[6] Upon arrival there, Lance Corporal Liew called Haji Asta at the same handphone number and was told that the deal will take place at the water treatment (or processing) plant of Kunak and not the shop. He informed ASP Sheik of the change in venue and they all proceeded to the said place.

[7] ASP Sheik parked his car opposite the road to Lance Corporal Liew's whilst Chief Inspector Mohd. Saifullah parked his behind that of Lance Corporal Liew.

[8] Not long after they arrived there, a blue Toyota Hilux car came and stopped opposite the road to Lance Corporal Liew's. A man later identified as the 1st accused alighted from the passenger side of the car after the driver (later identified as the 2nd accused) failed to get Lance Corporal Liew to approach them. The 1st accused entered the back passenger door of Lance Corporal Liew's car and asked him to show the money. Lance Corporal Liew showed a bundle of money with a RM100 note on top and he in turn requested to see the drugs. The 1st accused then used his right hand to take out a white envelope and from the envelope, Lance Corporal Liew was shown a packet containing what he believed was syabu.

[9] Upon seeing the drugs, Lance Corporal Liew took out his pistol and identified himself as a policeman. Upon seeing this, the 1st accused bolted from the car and ran towards an oil palm estate nearby but not before dropping the envelope on the road. Chief Inspector Mohd. Saifullah and his men gave chase whilst ASP Sheik went towards Lance Corporal Liew's car. ASP Sheik picked up the envelope from the roadside and Sergeant Major Ariffin and Lance Corporal Elly went towards the Hilux car where they arrested the 2nd accused as he was alighting from the car. Lance Corporal Liew identified the envelope seized by ASP Sheik as the one shown to him by the 1st accused which contained the drugs.

[10] After the 2nd accused was arrested, ASP Sheik did a body search on him and found a black Nokia handphone (exh. P8) from his waistband, another silver Nokia handphone (exh. P9) near the gear box of the Hilux car and a Polo brand sling bag (exh. P10) also inside the car. In the Polo sling bag was cash of RM8,000, a bunch of four keys, a passport, a piece of paper, an ATM card, an air ticket, a customs declaration form, a spectacles case and prayer beads. The last seven items were actually discovered by the 2nd accused's counsel in the sling bag during his cross-examination of ASP Sheik and they were tendered as defence exhibits (exhs. D1-D5 (a) and (b)).

[11] After the arrest and seizure, the two accused were brought to Kunak Police Station where they arrived at 5pm. Inspector Kanthan a/l Vivekhanantam was appointed as the Investigating Officer and he received the exhibits and the two accused persons from ASP Sheik at about 8pm that night. He said after receiving the exhibits he kept them in the exhibit store under the charge of Corporal Sharkawi (who was not called as a witness and not offered to the defence) but before doing so he had sealed the envelope containing the drugs which he later sent to the chemist, Encik Ahmad Nazri bin Husain (PW1) for analysis. Encik Ahmad Nazri testified that the white crystalline substance in the envelope contained 38.330 grammes of methamphetamine. Inspector Kanthan also verified that the black Nokia handphone sized from the 2nd accused's waistband was having the handphone number 016-8153043 when he used it to make a missed call to his own handphone.

[12] Mr. Lu Chee Leong, Head of Business Operation support for DIGI, the service provider for the handphone number 016-8153043 gave evidence and tendered the print-out of calls (exh. P21(b))

made from the said number from 23 September 2007 – 27 September 2007. It shows that there were calls made on the day of the offence to Lance Corporal Liew's handphone number 012-8109708, the first was at 1150 hours 30 seconds and the last two calls were at 1433 hours 6 seconds and 1505 hours 18 seconds respectively.

[13] He was asked in cross-examination whether the SIM card (exh. P17(a)) found in the black Nokia handphone was for the number 016-8153043. He said he was unable to tell unless he keyed in the serial number on the SIM card but the police never requested him to do this.

Issues Raised In Submissions Of The Accuseds' Counsel At Close Of Prosecution' Case

[14] In their written submissions, both counsel for the accused have raised the following issues, jointly and severally:

(i) Defective charge.

(ii) Element of common intention, unproved.

(iii) Break in the chain of evidence.

(iv) Element of possession, unproved.

(v) Actual sale of drugs, unproved.

(vi) Calls made from the alleged handphone of the 2nd accused.

(vii) Identity of Haji Asta.

Defective Charge

[15] The reason canvassed for this contention is that the weight of the drugs does not support the charge of trafficking. Both counsel submitted that for a charge of trafficking the weight of the methamphetamine must be 50 grammes or more because the presumption on trafficking under s. 37(da) of the Dangerous Drugs 1952 only applies to possession of 50 grammes or more of methamphetamine.

[16] I do not agree with this submission for the simple reason that the law does not prescribe a minimum weight for an offence of trafficking – only the minimum for a presumption to arise.

Therefore, for so long as the prosecution is able to bring their case within the definition of trafficking, the weight of the drugs is immaterial. What it only means is that the prosecution has a harder task in their hands as they could not rely on the presumption of trafficking under s. 37(da) of the DDA 1952. In support of my view, I need only refer to the Court of Appeal's case of *Abdul Karim Pak Kub & Anor v. PP* [1997] 2 CLJ 383 where this proposition was made.

Actual Sale

[17] The prosecution's case against both accused persons hinges on the alleged sale of methamphetamine which was negotiated by Lance Corporal Liew with the 2nd accused and which drugs was delivered for sale to him by the 1st accused. Both accused's counsel have submitted that to sustain the charge of trafficking the prosecution must prove that actual sale took place and in this case, because the drugs and money have not exchanged hands, the charge of trafficking is not proved.

[18] In answer to that submission, the learned Deputy Prosecutor has referred me to the rather recent and latest decision of the Federal Court and Court Appeal, *viz*, *Public Prosecutor v. Saari Jusoh* [2007] 2 CLJ 197 and *Jeva Subramaniam & Anor v. Public Prosecutor* [2009] 3 CLJ 597.

[19] Before going into these two cases, it is good to refer to the definition of trafficking under s. 2 of the DDA 1952. The material part of that section reads:

> In this Act, unless the context otherwise requires:
>
> …
>
> "trafficking" includes the doing of any of the following acts, that is to say, manufacturing, importing, exporting, keeping, concealing, buying, selling, giving, receiving, storing, administering, transporting, carrying, sending, delivering, procuring, supplying or distributing any dangerous drug otherwise than under the authority of this Act or the regulations made under the Act.

[20] The Federal Court in *Saari*'s case *(supra)* agreed that the expression 'selling' in the definition section be strictly construed as it forms part of a penal statute but said, after considering the definition of that word in *Webster's New World Dictionary &*

Butterworths Australia Legal Dictionary, that the meaning of 'selling' is of 'wide import'. The Federal Court then opined that 'selling' under s. 2 is ambiguous as its ordinary meaning is wide enough to include acts which are offences under other provisions of the Act.

[21] In view of its ambiguity, the Federal Court held that in construing the meaning of selling, offences that come within the ambit of s. 39B(1)(b) & (c) must be excluded and 'selling' must be construed as a reference to a present sale and not to one in the future. After considering authorities on the meaning of the word 'sale', the court held that a sale is complete upon transfer of the property in the goods even though the price has not been paid.

[22] The court in *Jeva*'s case applied the principle established in *Saari*'s case and also held that to constitute sale of the drugs it does not matter (on the facts of the case) that the drug has not been physically handed over to the agent provocateur or that the price has not been paid.

[23] It is to be noted that the facts in these two cited cases are similar to the ones before me in that there were negotiations for sale of the drug by the accused and an agent provocateur and that when the drug was in sight of the agent provocateur; but before the price money was delivered, a police party swopped in and arrested the accused. Of course in this case it was slightly different in that the 1st accused bolted from the car after Lance Corporal Liew identified himself and showed his gun to him. However on the strength of these two decisions, I must hold that the element of trafficking has been proved even though the sale agreed earlier was for 2 bals but the 1st accused only brought 1 bal of the drug.

[24] In respect of the 2nd accused, the evidence which linked him to the offence purely rests on the telephone calls made by Lance Corporal Liew from his handphone to the handphone number 016-8153043 and most importantly if the black Nokia handphone found on his waistband by ASP Sheik bore that handphone number. This is regardless of the fact that the registered subscriber for this 016-8153043 handphone number is not the 2nd accused but one Mulpi bin Sarul.

[25] In my view, the most important corroboration of Lance Corporal Liew's evidence would be the calls made on the day of the offence and there were several, right up to the time of the charge.

A It is obvious that the person Lance Corporal Liew spoke with using this handphone number of 016-8153043 was the one with the supply of the drugs and it was him who caused the 1st accused to make the delivery of the drugs to Lance Corporal Liew. If I accept that the person Lance Corporal Liew spoke to was the 2nd accused
B and he spoke to him at Sri Kunak and just before the commission of the offence, then there is no question that common intention has been established between the 1st and 2nd accused.

[26] The handicap of the prosecution of course was not verifying
C whether the SIM card found in the black Nokia handphone belonged to the number 016-8153043. However, I must also bear in mind that Inspector Kanthan has testified that he verified the handphone number of the black Nokia seized from the 2nd accused by using it to make a missed call to his handphone. Their other weakness is
D that the case against the 2nd accused is built purely on inference, by virtue of the telephone calls allegedly made from and the handphone seized from him.

[27] The 2nd accused's counsel has submitted that the handphone
E of Lance Corporal Liew and that of Inspector Kanthan were not tendered as evidence to verify what have been stated by them regarding the use of their handphones during the negotiation stage. In this regard, I also note that the evidence against the 2nd accused being one based purely on inference, then it must be an absolute
F one that the handphone seized from his waistband bore that 016-8153043 number and no other inference because if there is another inference from the facts which is favourable to him, I must adopt that inference. (see the Federal Court's case of *PP v. Mohd. Radzi* [2006] 1 CLJ 457).

G **[28]** Having examined the evidence on this issue, even though I do believe Inspector Kanthan that the number 016-8153043 appeared on his handphone when he used it to make the missed call, nevertheless, given that the case against the 2nd accused is built purely on inferences and circumstantial evidence, a prudent
H Investigating Officer would have verified that the SIM card found in the handphone seized from the 2nd accused bore that number 016-8153043. A more careful and equally prudent Investigating Officer in the circumstances of this case would also ensure not only the outgoing calls from the handphone number 016-8153043 were made
I to Lance Corporal Liew's handphone but the incoming calls as well,

in order to tally with the evidence of Lance Corporal Liew that he made calls to this number during the relevant period. If all these were done, the case built on inference and circumstantial evidence against the 2nd accused would have been impossibly tight. The fact that it was not done, rendered it weak and I will consider that effect after examining the other issues raised by the defence.

Further Incriminating Evidence: Conduct Of The 2nd Accused

[29] The learned Deputy Public Prosecutor has submitted lengthily on the implication of the evidence adduced which I mentioned earlier that the 1st accused bolted and ran from the car after Lance Corporal Liew introduced himself and the evidence of Sergeant Major Ariffin that as he and Lance Corporal Elly approached the Toyota Hilux, the 2nd accused came out of the car.

[30] I do agree that there is clear evidence of the 1st accused running away from the car and dropping the envelope containing the drugs on the road but in all fairness, I disagree that a similar conduct can be attributed to the 2nd accused. This is because the prosecution's evidence contradicts each other. On the one hand, he was said to have attempted to flee from the car but on the other hand, he was said to have been arrested while he was seated in the car. Therefore, the prosecution's submission on this point is only taken as relevant against the 1st accused.

[31] Conduct of the accused is relevant under s. 8 of the Evidence Act 1950 and many authoritative cases have explained it's operation. The Supreme Court in *Abdullah Zawawi Yusoff v. PP* [1993] 4 CLJ 1 held that fleeing from the scene after the announcement on the discovery of the drug was consistent with the accused knowing the presence of the drugs in the box, thus indicating a sense of guilt but it is also consistent with one being in a state of pure panic. This latter proposition is what the 1st accused's counsel is contending. She said her client panicked and was put in fear of his life when Lance Corporal Liew brandished his pistol.

[32] I am in disagreement with her on this point for his conduct is not just fleeing from the car but also dropping the envelope on the road. These two conducts are intricately bound and is not to be viewed in isolation. Viewed together against the evidence of Lance Corporal Liew that the 1st accused opened the envelope to show

him the drugs inside, these conducts of his tantamount to an admission of guilt on his part. In other words, the conducts are proof of his *mens rea* for the offence charged. His counsel submitted that he was just an innocent carrier. The fact that he opened the envelope to show Lance Corporal Liew the drug when asked to do so dispelled any notion of this contention.

Element Of Possession

[33] As against the 1st accused, there is no two ways that the envelope containing the drugs was in his custody and control as it was with him when he presented it to Lance Corporal Liew in the car.

[34] As against the 2nd accused, possession is not proved by direct evidence but circumstantial evidence – the circumstances here refers to the negotiation for sale which my earlier considerations on the handphone found on his person by ASP Sheik established that the man Lance Corporal Liew negotiated with, known as Haji Asta was the 2nd accused. The fact that he was in the car with the 1st accused after negotiating the sale of the drug with Lance Corporal Liew and determining as well as changing the place of transaction gave an irresistible and only inference that he knew that the envelope which the 1st accused took to Lance Corporal Liew's car and showed to Lance Corporal Liew contained the drug methamphetamine. His knowledge of the drug is established and being the person with whom the negotiation was done right up to the time of the offence, I find that the elements of possession have been proved against him as well.

[35] The 2nd accused's counsel referred to the existence of a person named Hassan Astha as a factor which exonerates his client's guilt in view of the similarity in the name with Haji Asta. This name cropped up because it appeared on the airline ticket (exh. D1) found in the sling bag (exh. P10). The sling bag, it must be remembered was not instrumental in any way to the drugs seized in this case and the connection which the 2nd accused's counsel try to establish between the airline ticket, the person named Hassan Astha printed on it and the drugs seized in this case is simply non-existent.

Break In The Chain Of Evidence

[36] The defence's submission on this issue is made along these lines:

(i) there was no explanation on what happened to the exhibits seized by ASP Sheik in the four hours after the seizure to the time of handing over to Inspector Kanthan.

(ii) Corporal Sharkawi who was in charge of the exhibit store was not called to give evidence.

(iii) Inspector Kanthan's contradictory evidence on the times he took out the envelope containing the drugs.

[37] The learned Deputy Public Prosecutor submitted that the defence counsels' submissions on the failure to account for the five hours between seizure and handing over of the exhibits should not be considered because both counsels never cross-examined the relevant witnesses ie ASP Sheik and Inspector Kanthan about these five hours. He referred to the Federal Court's case of *Wong Swee Chin v. Public Prosecutor* [1980] 1 LNS 138 as authority for his proposition. This case, in my view, established a general rule that the failure to cross-examine a witness on a crucial part of the case amounts to an acceptance of his testimony but there are exceptions to that general principle for example where the story in itself is incredible or where counsel chose not to cross-examine as the matter is a delicate one or they just wanted to save the court's time and where one or more witnesses have given evidence on the same subject matter.

[38] Both defence counsel in this case have failed to bring themselves within any of the exceptions above or some other exceptions which they think is good law for me to consider. At any rate, I am satisfied, there being no evidence adduced to the contrary that the exhibits were all in his custody before he handed them over to Inspector Kanthan as shown by the handing over note (exh. P19) signed by both of them, that the prosecution has dispelled any improprieties about the safety of the exhibits in these five hours. The case cited by the 2nd accused's counsel ie *Shamsuddin Hassan & Anor v. Public Prosecutor* [1991] 3 CLJ 2414; [1991] 1 CLJ (Rep) 428 is distinguishable because there the drugs

were not even marked until it was packed six days after the Investigating Officer received it from another witness and what that witness did during that time before the handover is of course material.

[39] In this case, in respect of the envelope containing the drug, ASP Sheik has testified that he signed on it as well as the white plastic packet inside and put the date '27 September 2007' on both the envelopes and the packet. Inspector Kanthan's evidence is that he had put the plastic packet plus the envelope in a white envelope which he marked as E1, sealed and affixed it with the official seal and stamp of 'IPD Kunak'. The seal number given was 377, and only after these were done did he hand it to Corporal Sharkawi to keep in the store with the other exhibits. Subsequently, he sent the drug personally to the chemist in Kota Kinabalu and that when he took the envelope from the exhibit store, the seal was still intact. The chemist in turn in his evidence testified receiving the sealed envelope from Inspector Kanthan.

[40] I move now to consider the submission of the 2nd accused's counsel on the photographs taken by the exhibits. These ten photographs were tendered as defence's exhibits, ie exh. D6(a)-(j) and their negatives, exh. D6N(a)-(j). Inspector Kanthan testified that he took the photographs himself on 27 September 2007. Exhibit P6(a) is a photograph of the drug in a clear plastic packet. Exhibit P6(b) is a photograph of the car and exh. P6(j), the last photograph is that of the envelope marked E1 which contained the drug in the clear plastic packet. Inspector Kanthan agreed that these photographs were taken in sequence as borne out by the numberings on the negatives. This means to say that exh. P6(a) was taken first followed by exh. P6(b) and the rest, but in cross-examination, Inspector Kanthan agreed that the photograph of the car was taken in the morning of 28 September 2007 and the inference of course is that those of the drugs ie exh. P6(a) and exh. P6(j) were also taken on 28 September 2007. Inspector Kanthan has testified however that he handed the exhibits (except the Toyota Hilux) to Corporal Sharkawi on 27 September 2007 at 2215 hours to register the exhibits and to keep them in the exhibit store after he had sealed the envelope containing the drug as I have narrated earlier. After that he said he only took out the sealed envelope containing the drug on 1 October 2007 when he wanted

to send the same to the chemist for analysis. If this was so, then it is impossible to reconcile this evidence with the evidence earlier given that photographs of the drug exhibit were taken on 27 September 2007. The inescapable conclusion is that the sealed envelope containing the drugs were taken from the exhibit store, opened and then photographs of the drugs were taken in the morning of 28 September 2007 before the photographs of the Toyota Hilux were taken.

[41] As rightly submitted by the learned counsel for the 2nd accused, Inspector Kanthan was not asked to explain these gaps in the evidence. The one other person who could assist the court in resolving this issue is Corporal Sharkawi. He was not in the prosecution's list of witnesses and was not offered to the defence. The 2nd accused's counsel has rightly cited the case of *Abdullah Zawawi Omar v. Public Prosecutor* [1985] 2 CLJ 2; [1985] CLJ (Rep) 19 for the proposition that making a witness available to the defence "is to prevent them from commenting the honesty of the prosecution and thus invoking the often quoted presumption of adverse inference under s. 114(g) of the Evidence Act. But where the prosecution's evidence falls short of proving a *prima facie* case at the end of it's case, the right not to call such witness/witnesses and to make him/them available to the defence will be of no avail". I do acknowledge that it is the prosecution's discretion whether to call or not to call a particular witness and they need to call only witnesses necessary to the unfolding of the 'narrative upon which it's case is based' (per Augustine Paul J, as His Lordship then was) in *Public Prosecutor v. Chia Leong Foo* [2000] 4 CLJ 649.

[42] However, in view of this unexplained anomaly in the evidence, I am not certain that the drugs which were dropped by the 1st accused, seized from the roadside by ASP Sheik, handed over to Inspector Kanthan and sent by him to the chemist is one and the same. In other words, there are gaps in the chain of evidence pertaining to the handling of the drugs which is the subject matter of the charge in this case. I am aware that it is not necessary to call each and every witness to ensure that there is no break in the chain of evidence pertaining to the drugs seized (see *Su Ah Ping v. Public Prosecutor* [1979] 1 LNS 100 as quoted by the Supreme Court in *Mohd. Osman Pawan v. Public Prosecutor* [1989] 2 CLJ 388; [1989] 1 CLJ (Rep) 108) but in this case although not

every minute must be accounted for by the prosecution, I must be certain that from the time of it's seizure to the time of analysis by the chemist, the evidence pertaining to the identity and security of the drug seized is able to withstand the test of maximum evaluation by the court. I am not confident that this has been achieved in this case.

[43] As against the 2nd accused, my earlier consideration on the shortcomings of the investigation with respect to the handphone seized from him strengthened my view that a *prima facie* has not been established against him.

[44] Thus, for these flaws in the prosecution's case, I discharged and acquitted both the accused persons of the charges of drug trafficking.